MALAYAN UNION REPORTS.

PUBLIC PROSECUTOR vs. VIRAN.

[App. Crim. Juris. (Spenser Wilkinson, J.) January 2, 1947]

Arms Enactment, Section 4 (ii)—Rule 76 of Rules made under Section 5 of the Explosives Enactment—Possession of a shot gun and possession of cartridges—Whether person in possession can be prosecuted under the Arms Enactment and under the rules made under the Explosives Enactment after the coming into force of the Firearms and Ammunition (Unlawful Possession) Ordinance, 1946—Single act being an offence under two or more distinct provisions of the law providing widely different punishments—Interpretation and General Clauses Enactment Section 27—Interpretation Ordinance (S.S.), Section 4 (g)—District Judge cannot refuse to try charge under Arms Enactment on ground that he has no jurisdiction to try case—After hearing the case he may exercise his discretion under Section 177 of the Criminal Procedure Code to transfer case to a higher Court—Criminal Procedure Code, Section 173 (a) and (h).

In this case the accused was charged before a District Court under Section 4 (ii) of the Arms Enactment and under Rule 76 of the rules made under Section 5 of the Explosives Enactment respectively with being in possession of a shot gun and with being in possession of four cartridges. On the day upon which the accused was before the District Court, the Firearms and Ammunition (Unlawful Possession) Ordinance 1946 had come into force. The District Judge thought it right to frame new charges under Section 3 thereof and as the maximum punishment under that section was ten years' rigorous imprisonment he transferred the case to the Magistrate to hold a Preliminary Enquiry with a view to the committal of the accused to the Assizes. It was against this order of the District Judge framing the new charges and remitting the case for Preliminary Enquiry that the appeal was brought on behalf of the Public Prosecutor.

Held, (1) that, by virtue of Section 27 of the Interpretation and General Clauses Enactment (corresponding to Section 4 (g) of the Interpretation Ordinance of the Straits Settlements), where the law provides, either in the same or different Enactments, for different penalties for the same offence, both or all of the provisions as to punishments are intended to stand side by side and it is left to the proper authorities to decide under which of the different provisions the offender shall be prosecuted and punished;

(2) that, in this case the order made by the District Judge remitting the case to the Magistrate's Court for Preliminary Enquiry was wrong, as the District Judge had jurisdiction to try the accused under the two charges preferred against him and should therefore have proceeded to hear the evidence or at least to hear the prosecution open the case;

(3) that the District Judge can act under Section 177 of the Criminal Procedure Code if upon the facts of the case it appears to him that the case ought to be tried by the High Court and in that case, he can either transfer by sending the case to a Magistrate or himself proceed under Chapter XVII of the Criminal Procedure Code.

CRIMINAL APPEAL FROM DISTRICT JUDGE.

A. J. Grattan Bellew for the Public Prosecutor.

Respondent in person.

Spenser-Wilkinson, J. :—The accused in this case was charged before a District Court under Section 4 (ii) of the Arms Enactment and under Rule 76 of the rules made under Section 5 of the Explosives Enactment, respectively with being in possession of a shot gun and with being in possession of four cartridges.

On the day upon which the accused was before the District Court, a new Ordinance entitled "The Firearms and Ammunition (Unlawful Possession) Ordinance, 1946," was gazetted. The District Judge being aware of the existence of this Ordinance thought it right to frame new charges under Section 3 thereof. The maximum punishment under that section being ten years' imprisonment he transferred the case to the Magistrate to hold a Preliminary Enquiry with a view to the committal of the accused to the Assizes. It is against this order of the District Judge framing the new charges and remitting the case for Preliminary Enquiry that this appeal is now brought on behalf of the Public Prosecutor.

The basis of the District Judge's decision is that Section 3 of the Firearms and Ammunition (Unlawful Possession) Ordinance, 1946 substituted for the penalties prescribed in the Arms Enactment and the Rules under the Explosives Enactment a new penalty of ten years' imprisonment or a fine of $10,000 or both, and that the penal provisions under the existing law were impliedly repealed in so far as they dealt with penalties for the possession of arms and explosives. The relevant portions of Section 4 of the Arms Enactment read as follows :—

> 4. (i) No person shall in any State have in his possession or custody any arms except under a licence or permit in that behalf under this Enactment and in accordance with the conditions of such licence or permit and such conditions as may be prescribed.
>
> (ii) Any person who shall have in his possession or custody any arms without such licence or permit.....shall be liable to imprisonment of either description for a term not exceeding three years or to a fine not exceeding $500/- in respect of every such arm or to both.

Paragraph 5 of the Explosives Enactment provides that the Resident may make rules to regulate or prohibit except under licence the possession of

explosives, gives power to impose penalties in the rules and provides that the maximum penalty which may be imposed by such rules in the case of a person possessing an explosive shall be a fine of $700. Under these powers rules have been made and by rules 74 and 76 possession of any explosive except under permit is made punishable with a fine not exceeding $300. I shall refer in this Judgment to the Arms Enactment as "the Enactment," to the Rules under the Explosives Enactment as "the Rules", and to the Firearms and Ammunition (Unlawful Possession) Ordinance, 1946, as "Ordinance No. 28".

Section 2 of Ordinance No. 28 after defining the words "ammunition" and "firearm", defines "unlawful possession" of a firearm or ammunition as being possession contrary to the provisions of any Enactment or Ordinance or of any rule made thereunder regulating the possession of arms or ammunition. Section 3 reads as follows :—

> 3. Without prejudice to the provisions of any written law in force in any part of the Malayan Union relating to unlawful possession of arms or ammunition, any person who shall, after the commencement of this Ordinance, be in unlawful possession of any firearm or ammunition shall be liable to imprisonment of either description for a term which may extend to ten years or to a fine not exceeding ten thousand dollars or to both such imprisonment and fine.

The first point that has to be decided, it seems to me, is whether apart from the first phrase of the Section, its provisions are inconsistent with the existing law so as to effect an implied repeal of the provisions of the Enactment and rules relating to punishment for possession. For the Public Prosecutor it is contended that there is no inconsistency; that the Ordinance creates an entirely new offence; that these new provisions can stand side by side with the existing provisions of the Arms and Explosives Enactments; and that the result is that in certain instances there are alternative remedies open to the Public Prosecutor in respect of acts which may come within the definition either of the offences under the Enactment and Rules or of the new offence created by Ordinance No. 28.

The District Judge has stated in his grounds of judgment that the provisions of Section 3 of Ordinance No. 28 are clearly inconsistent with the provisions of Section 4 (ii) of the Enactment, and Rules 74 and 76 of the Rules because the former prescribes a punishment for the identical offence of possession which is different from the punishment prescribed under the latter. He points out that the intention of the legislature appears to have been to enhance the punishments for possession of arms and ammunition because the punishments under the Enactment and Rules were inadequate. As an additional reason for holding that both sets of provisions cannot remain in force together he points out that his would give the Public Prosecutor a discretion whether he should proceed under an Enactment or under Ordinance No. 28 and that this discretion can only rightly be exercised by the Court.

There are numerous instances of a single act being an offence against at least two distinct provisions of the law providing widely different punishments. Various examples were quoted to me but I think the clearest example is given by comparison between Section 3 (i) (a) of the Women and Girls Protection Enactment and Section 372 and 373 of the Penal Code. The latter sections provide a punishment of ten years' imprisonment in respect of selling or buying a minor for the purpose of prostitution. Section 3 (i) (a) of the Enactment provides a penalty of two years' imprisonment only in respect of selling or buying any woman or girl for the purposes of prostitution. It is quite clear that any person who commits an offence under Section 3 (i) (a) of this Enactment must of necessity, if the victim is under 21 years of age, have committed an offence also against either Section 372 or Section 373 of the Penal Code. Yet I do not think it has been suggested that Section 3 (i) (a) of this Enactment repealed any part of Sections 372 or 373 of the Penal Code. The only difference between the two sets of sections is that under the one it is the selling of a woman or girl of any age which is dealt with, whereas under the other only persons under the age of 21 years are dealt with. It might be argued that the Enactment applies only to women and girls over the age of 21 and that in all other cases the Penal Code would have to be resorted to. But it is difficult to understand if this were the intention, why the words the age of "21 years or upwards" were not inserted in Section 3 (i) (a).

It seems to me that the question of whether two such similar penal provisions can subsist side by side is resolved by Section 27 of the Interpretation and General Clauses Enactment and also, in so far as Malayan Union Ordinances are concerned, Section 4 (g) of the Interpretation Ordinance of the Straits Settlements. Section 27 of the Interpretation and General Clauses Enactment reads as follows :—

> 27. Where an act constitutes an offence under two or more Enactments the offender shall, unless the contrary intention appears, be liable to be prosecuted

and punished under either or any of those Enactments, but shall not be liable to be punished twice for the same offence.

The equivalent section of the Straits Settlements Ordinance is similar except that it refers in addition to liability at Common Law.

It seems clear, therefore, that where the law provides, either in the same or different Enactments, for different penalties for the same offence that both or all of the provisions as to punishments are intended to stand side by side and that it is left to the proper authorities to decide under which of the different provisions the offender shall be prosecuted and punished.

The next question is whether this general rule is affected in this instance by the opening phrase of Section 3 of Ordinance No. 28. I think the meaning of the expression "without prejudice" in the context is not really open to doubt. One meaning of the expression "to prejudice" is "to impair", and I read the words "without prejudice to the provisions of any written law in force in any part of the Malayan Union relating to unlawful possession of arms or ammunition" as meaning that what follows is not to impair the force of any of the existing provisions and is therefore not to override or repeal them.

The only difficulty in the way of adopting this construction is that the words appear at first sight to be superfluous. If the interpretation I have placed upon the operative part of the section is correct, then the punitive provisions of the Enactment and Rules would be unaffected and there would be no need for a saving clause. I think, however that the saving clause, which is couched in very wide language was inserted as a matter of precaution to ensure that no provision of any of the numerous Enactments and Ordinances in force in the various parts of the Union should be thought to have been impliedly repealed. It was not necessary to mention specifically the provisions as to punishment because these were dealt with by Section 4 (g) of the Interpretation Ordinance of the Straits Settlements. I agree with the District Judge that it is the other provisions of the existing law that are intended to be saved.

The difficulty in which the District Judge found himself in interpreting this phrase arose, I think, partly from his view that the offences under the Enactment and Rules and the offences dealt with by Ordinance No. 28 were absolutely identical and also from the fact that his attention was not directed to the Interpretation Ordinance. I think, however, that the Deputy Public Prosecutor was right in his contention that in fact a new offence has been created. From the more general offences of possession of "arms" as defined in the Enactment and the possession of "explosives" as defined in the Rules the legislature has selected two special types of arms and explosives, namely, "firearms" and "ammunition" and has provided that the possession of those particular forms of arms or explosives shall be punishable with ten years' imprisonment. It is true that a person who has committed an offence against Ordinance No. 28 must also have committed an offence against the Enactment or the Rules but the converse is by no means true. Neither possession of an arm not defined as a "firearm" by Ordinance No. 28 nor of an explosive which is not "ammunition" would be an offence against that Ordinance although it would be an offence against the Enactment or the Rules.

This brings me to the question of the alleged discretion of the Public Prosecutor to decide under what provision of law an offender who has contravened the provisions of various different sections shall be prosecuted. It is contended on behalf of the Public Prosecutor that under Section 376 of the Criminal Procedure Code he has a discretion to decide what the charge shall be in any particular case. I do not think "discretion" is quite the right work, for the real discretion is clearly given by the Code to the Court. The position appears to me to be that, having the control and direction of criminal prosecutions under the Code, the Public Prosecutor has a duty to conduct prosecutions in the best interests of justice. If, in his opinion, an offender is guilty of a technical or trivial offence and should therefore be prosecuted under some section which provides a light punishment, although such offender would be liable to a heavier punishment under some other provision, then it is his duty to act accordingly and to put the matter before the Court in the way which in his opinion upon the material before him he considers to be right. He will be aware that the course he has advised may not, when all the evidence has been given, commend itself to the Court which tries the case, but in the majority of cases the prosecuting officer will be in a position in the early stages of a prosecution to know the type of case with which he is dealing and is therefore the best judge as to the form in which the proceedings should be initiated. If in the course of the proceedings it appears to the Court upon the facts disclosed that the offender ought to be prosecuted under some other section, the Court undoubtedly has a discretion to amend the

charge or to remit the case to some higher Court. This is judicial discretion and if properly exercised will not be interferred with. On the other hand, I do not think it is incumbent upon a Court to interfere with the procedure adopted by the prosecution unless and until on the evidence or other material before it the Court is satisfied that some different course ought to be adopted.

I was at one time in some doubt upon the question of the jurisdiction of the District Court, in view of the wording of paragraph (a) of Section 20 of the Courts Ordinance, 1946. It seemed to me that if the District Court's jurisdiction in respect of offences under the Enactment and Rules were derived solely from paragraph (a) of this Section, it would not have jurisdiction in respect of any offence which came within the purview of Ordinance No. 28 because I read the words "the maximum term of imprisonment provided by law" as meaning the maximum term provided in any circumstances by any law. I think, however, that paragraphs (a), (b), (c) and (d) of that section are cumulative, and there is no doubt that the existing laws gave to the Court of a Magistrate of First Class jurisdiction under the Enactment and under the Rules. A District Court, therefore, has jurisdiction in respect of offences against the Enactment and the Rules by virtue of Section 20 (c) of the Courts Ordinance.

I have, therefore, come to the conclusion that the order made by the District Judge on the 26th October, 1946, remitting the case to the Magistrate's Court for Preliminary Enquiry was wrong. The District Judge had jurisdiction to try the accused under the two charges preferred against him and should therefore have proceeded to hear the evidence or at least to hear the prosecution open the case. It is true that Section 177 of the Criminal Procedure Code provides that where it appears *at any stage* of the proceedings that from any cause the case is one which ought to be tried by some other Court the proceedings can be stayed and transferred to such Higher Court. But it appears from the District Judge's grounds of decision that his reason for transferring the case to some Court of higher jurisdiction was not so much the exercise of a discretion under Section 177 as a finding that he had no jurisdiction to try the case.

The order of the District Judge transferring the case to a Magistrate will be reversed, with the result that the accused will again come before the District Judge for trial upon the original charges. I desire to make it clear, however, that nothing I have said in this judgment is to be taken as limiting the discretion of the District Judge to deal with the cause under Section 177 of the Criminal Procedure Code if upon the facts it appears to him that the case ought to be tried by the High Court. The fact that carrying arms is punishable with death and that the legislature has seen fit deliberately to increase the penalty for the mere possession of arms to a maximum of ten years' rigorous imprisonment may well be a reason for a District Judge forming the opinion that a case of this kind ought to be tried by a Court of higher jurisdiction. This, however, will depend upon the facts of each case, and no general rule can be laid down.

Two points arose in the course of the argument before me on which it might be advisable for me to express an opinion. The first is whether it is the duty of a Magistrate under Section 173 (a) to frame a charge when the accused appears before him. This paragraph does not specify who is to frame the charge but states that a charge shall be framed and read and explained to the accused. It appears to have been taken from Section 242 of the Indian Code of Criminal Procedure but differs very considerably from it. I think the omission to specify who is to frame the charge is deliberate and that the purpose of the paragraph is simply to ensure that there shall be a charge and that it shall be read and explained to the accused. If a charge has been framed by a prosecuting officer and appears to be technically in order on the fact of it, then it seems to me that the provisions of the paragraph are sufficiently complied with when that charge is read and explained to the accused. If such a charge has in fact been framed then it is not until evidence has been heard that it becomes the duty of the Court to consider the charge, to decide whether it is sufficient and if necessary to amend it under paragraph (h) of the same section.

Finally, a point was raised as to whether under Section 177 a District Judge has power to transmit the case to a Magistrate for Preliminary Enquiry or whether he is under obligation to proceed himself with the Preliminary Enquiry with a view to commital of the accused. The section lays down that the Magistrate is to transfer the case to a higher Court or to proceed himself under Chapter XVII. I think this point is covered by Section 34 (ii) of the Courts Ordinance, 1946, which provides that the practice and procedure shall accord with the provisions of the existing laws but shall be applied with such modifications as are necessary to make them applicable to the

courts established under the Ordinance or to any Judge, Magistrate or officer thereof. The only way in which a District Judge can transfer the case to a Court of higher jurisdiction than his own is by way of Preliminary Enquiry. Under Section 177, therefore, he can either transfer by sending the case to a Magistrate or himself proceed under Chapter XVII of the Criminal Procedure Code.

Appeal Allowed.

FOH KWEE YENG (f) v. THE CAMESON HOTEL.

[Original Civil Juris. (Evans, J.) January 25, 1947]

Rent and Charged Land (Restriction) Enactment, 1940, Section 13—Power of Rent Assessment Board to rehear a case at any time—Procedure of Board—Civil Procedure Code, Section 579—Whether the Court has jurisdiction to issue an order of ejectment in the case of a monthly tenancy created during the Japanese occupation in view of Section 3 of the Courts (Restriction of Civil Jurisdiction) Ordinance 1946—Point not pleaded.

The plaintiff in this case asked for ejectment of the defendant from the premises known as 214, Brewster Road. It appeared that the defendant went into possession of the premises during the Japanese occupation of Malaya on a monthly tenancy. The rent was reassessed in Straits dollars after the re-occupation of the country and thereafter it continued as a monthly tenancy. On the 18th of February 1946 the Rent Restriction Board made an order refusing the application of the plaintiff for leave to eject the tenant. Three months later a new application was made before the Rent Board differently constituted and on the 2nd of May 1946 the Board gave leave to eject the tenant. After the Board had granted leave, the landlord gave a notice to quit dated the 15th May 1946 to expire on 30th June 1946 and that notice has not been challenged. In his plaint the plaintiff alleged the tenancy, the order of the 2nd May 1946, the notice of the 15th May 1946 and the defendant's failure to comply. The defendant did not dispute any of these matters as facts but set up the order of 18th February 1946 and pleaded that the Order of the 2nd of May 1946 was ultra vires and bad.

Held, (1) that as Section 13 of the Rent and Charged Land (Restriction) Enactment provides that the Board shall have "full powers of rehearing, reconsideration and revision in any case at any time" the Board had power to make the second order in this case and the later order must be read as superseding the former.

(2) that the point of law, raised by the defendant that the second order of the Board was bad fails and that Judgment must accordingly be given for the plaintiff for an order of ejectment.

Quaere Whether the Court has jurisdiction to issue an order of ejectment in the case of monthly tenancies created during the Japanese occupation in view of Section 3 of the Courts (Restriction of Civil Jurisdiction) Ordinance 1946. This point was not pleaded and it was held that it was unnecessary to decide the point in this case.

Cases referred to:—

(1) *Chajju Ram v. Neki and others* (1922) A.I.R. P.C. 112.

(2) *Yeo Peck Chie v. K. S. Gill & Co.* (1946) 12 M.L.J. 131.

ACTION FOR EJECTMENT.

H. T. Ong for the plaintiff.

M. S. Mahendran for the defendant.

Evans, J.:—In this case the plaintiff asks for ejectment of the defendant from premises known as 214, Brewster Road, Ipoh. The plaintiff applied to the local Rent Restriction Board a year ago and on 18.2.46 the Board heard the parties and made an order refusing the application because the plaintiff landlord had other accomodation and the defendant had none, and because there was some doubt as to a point of law arising out of a letter of 17.10.44 and the continued acceptance of rent. Some three months later a new application was made before the Rent Board differently constituted, and on 2.5.46 that Board gave leave to eject the tenant.

The defendant went into possession of the premises during the Japanese occupation of Malaya on a monthly tenancy and, as was admitted before me, the rent was reassessed in Straits dollars after the re-occupation of the country. Thereafter it continued as a monthly tenancy and the landlord at the time of the May application had not given notice to terminate it. After the Board had granted leave he gave a notice dated 15.5.46 to expire on 30.6.46 and that notice has not been challenged.

In his plaint the plaintiff alleged the tenancy, the order of 2.5.46, the notice of 15.5.46, and the defendant's failure to comply. The defendant did not dispute any of these matters as facts, but set up the order of 18.2.46 and pleaded that the order of 2.5.46 was ultra vires and bad. The plaintiff applied to have the defence struck out as disclosing no reasonable answer and as being frivolous and vexatious. A point of law having been raised in the pleadings, the order asked for was refused and the case set down for hearing of the argument on the point raised.

The defendant contends that the two orders of the Board are inconsistent and cannot stand together. The second order does not revoke or cancel the first. It was not made and does not purport to be made in